

THE ATTORNEY GENERAL



STATE OF UTAH
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DAS-5261

- VERNON B. ROMNEY
ATTORNEY GENERAL
- ROBERT B. HANSEN
DEPUTY ATTORNEY GENERAL

February 24, 1971

Senator Robert F. Clyde
Utah State Senate
State Capitol Building
Salt Lake City, Utah

Dear Senator Clyde:

Pursuant to your request of February 23, 1971, for an opinion regarding the legality of the construction of a grade separation structure in Provo Canyon by the Utah State Department of Highways and payment for same out of "Highway User Funds", please be advised that I have checked the provision found in the Constitution of the State of Utah in Article XIII, Section 13, and the opinion set forth in this letter is based upon my review of that provision of the Constitution.

It is my understanding that the Utah State Road Commission and the State of Utah, Division of Parks and Recreation, have agreed to a transfer of the railroad right-of-way presently owned by the Utah State Road Commission in Provo Canyon and west of Deer Creek Reservoir, and it is further my understanding that the State of Utah, Division of Parks and Recreation, is to pay the Utah State Road Commission the acquisition cost which the Utah State Road Commission paid the railroad to acquire the right-of-way. It is further my understanding from our conversation that the purchase of the right-of-way by the Division of Parks and Recreation contemplates the use of the right-of-way for railroad purposes between Heber City and the Vivian Park area in Provo Canyon. I further understand that the utilization of the right-of-way for railroad purposes will require a grade separation structure in Provo Canyon, and your question is whether or not

Senator Robert F. Clyde
February 24, 1971
Page 2

said structure can be paid for out of "Highway User Funds". I am assuming that if the State Road Commission were to retain title to the right-of-way that their plans would call for removal of the railroad facility and a grade separation structure would not be necessary under their plans.

Section 13 of Article XIII of the Constitution of the State of Utah provides that the "Highway User Funds" are to be used as follows:

". . .

(1) The construction, improvement, repair and maintenance of city streets, county roads, and state highways, including but not restricted to payment for property taken for or damaged by rights-of-way, and for administrative costs necessarily incurred for said purposes. . . ." (Emphasis added)

To simplify matters, one can assume a hypothetical situation. If the railroad were still operating between Provo and Heber City as it used to, and the Highway Department desired to improve the road in Provo Canyon, and a grade separation structure were necessary, there is no question but what the State Road Commission would have to pay the cost of the grade separation structure unless it could be determined that the railroad was being bettered in some way, in which case they might have to participate in part of the costs. Turning to the situation as it would exist after the transfer of the right-of-way from the State Road Commission to the Division of Parks and Recreation, it seems that we have a somewhat similar case, to wit, the necessity of a grade separation structure to enable the Division of Parks and Recreation to operate the railroad. I, therefore, think that it is conceivable that this would be within the intent of Article XIII, Section 13 of the Constitution, and if the Legislature adopts Senate Joint Resolution No. 16, it seems that the Legislature would definitely be on record, and this would give some additional justification for use of "Highway User Funds" for the

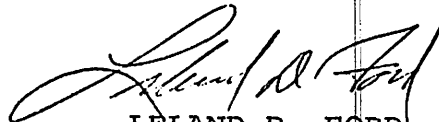
Senator Robert F. Clyde
February 24, 1971
Page 3

construction of this grade separation structure.

I think that it is certainly within the realm of possibility that someone might choose to contest the legality of this proposed expenditure, however, since it is possible to argue that inasmuch as the State Road Commission now owns the right-of-way and can make whatever use of it that it determines best, that to require the State Road Commission to not only sell the right-of-way but to also go the additional step and build a grade separation structure places an unnecessary burden on the "Highway User Fund",

In essence I would say that the Joint Resolution is proper, and if enacted by the Legislature, that the Highway Department can build the grade separation structure out of "Highway User Funds", but that the court might ultimately have to resolve the question as to whether this is an unfair or unnecessary burden on the "Highway User Fund", and the cost of the structure might have to be paid for by the Division of Parks and Recreation of the State of Utah.

Sincerely,



LELAND D. FORD

Assistant Attorney General

LDF:bc

Copy: Mr. Henry Helland